Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

CHRISTIE LEE LITTLETON,
Petitioner,

v.

DR. MARK A. PRANGE,
Respondent.

On Petition for Writ of Certiorari To The Supreme Court of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The denial of the petition for discretionary review and the motion for rehearing by the Supreme Court of Texas, leaving the opinion of the Fourth Court of Appeals District of Texas intact, presents fundamental statutory and constitutional issues concerning the Full Faith and Credit provisions of Article IV, § 1, and, the equal protection clause of Amendment XIV, of the Constitution of the United States.

1. Whether Texas violated the Full Faith and Credit clause of Art. IV, § 1, in voiding a transsexual's constitutionally protected, private and intimate marital relationship, as a member of her medically assigned genital sex to a person of the opposite genital sex, without a compelling and sufficient state interest or proper governmental objective.

2. Whether the Equal Protection clause of Amendment XIV, applies equally to all women, including those who medical professionals identify as women, at birth or later, and, consequently, to all heterosexual marriages, regardless of whether the parties' genitals were present at birth or medically formed.

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PETITION FOR WRIT OF CERTIORARI

Christie Lee Littleton (hereinafter, "Mrs. Littleton") petitions for a writ of certiorari to review the decision of the Fourth Court of Appeals District of Texas, Opinion, having been denied discretionary review by the Texas Supreme Court.

OPINIONS BELOW

The opinion of the Fourth Court of Appeals (App. C 1 – 25) is reported at 9 S.W.3d 223 (Tex. App., 1999). The denial of discretionary review by the Texas Supreme Court (App. A 1) is reported at 10 S.W.3d No.2, SCTOL-4 (Tex., Mar. 14, 2000). The order denying motion for rehearing of the petition for review by the Texas Supreme Court (App. B 1) is reported at 15 S.W.3d No.2, SCTOL-2 (Tex., May 30, 2000).

JURISDICTION

The order denying discretionary review was entered by the Texas Supreme Court on March 2, 2000. (App. A 1.) The judgment of the Fourth Court of Appeals was entered on October 27, 1999. (App. C 1-25.) A motion for rehearing was timely filed with the Texas Supreme Court on April 18, 2000, which motion was denied on May 18, 2000. (App. B 1.) Petitioner states that the jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257, to review this petition for certiorari.

CONSTITUTIONAL PROVISIONS

1. ARTICLE IV, Section 1, of the United States Constitution provides in pertinent part:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.

2. AMENDMENT IX of the United States Constitution provides in pertinent part:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

3. AMENDMENT XIV, Section 1, of the United States Constitution provides in pertinent part:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case concerns the right of transsexuals to have their state sanctioned marriages recognized in a sister state when the transsexual changes state residence. It also involves a fundamental conflict among the states regarding the transsexual's right and ability to marry.

Specifically, the broad fundamental question is whether a legal marriage contract entered into in one state shall be given Full Faith and Credit by all sister states. Flowing from that question are two equally important

questions. First, whether a transsexual is entitled to have her legal sex conform with the sex recognized by medical professionals, defined as the medically confirmed genital sex of the post-operative status, or, as the sex stated on an original birth record. And, second, whether the constitutionally protected right to marry extends to transsexuals.

As a constitutional matter, this case presents to this Court its first opportunity to answer the questions of whether the protections afforded to both men and women under all the laws of our country apply equally to transsexual men and transsexual women, and settling divergent, and often opposing, decisions among several states, as well as the federal courts. In so doing, this case presents this Court with the opportunity to define what is a "male" and what is a "female."

The constitutional issues of full faith and credit and equal protection, as applied to the States by Amendment XIV, were first raised following the issuance of the written opinion of the Court of Appeals, Fourth District, 9 S.W.3d 223 (Tex. App., 1999) (App. C 1-25), where the appellate court issued an opinion and ruling that used criteria, including religious belief, supposition, and the federal Defense of Marriage Act, 28 U.S.C.A. §1738C (1996) rather than address the stipulated evidence and entire body of case law on this subject.

The Petitioner addressed these issues in the petition for discretionary review and motion for rehearing before the Supreme Court of Texas.

STATEMENT OF THE FACTS

Christie Lee (Cavazos) Littleton legally married Jonathan Mark Littleton[1] in Kentucky on December 31, 1989. On July 29, 1996, Mr. Littleton died as the result of alleged medical malpractice by Dr. Mark A. Prange. Mrs. Littleton, along with the decedent's mother and the decedent's children by a previous marriage, filed suit for the wrongful death of Mrs. Littleton's husband against Dr. Prange.

In the course of discovery, Dr. Prange's counsel became aware that Mrs. Littleton's birth certificate stated, "Lee V. Cavazos, Jr., a male, born March 29, 1952." Mrs. Littleton freely disclosed that in 1977, she had petitioned a local Texas District Court for a legal change of name from Lee V. Cavazos, Jr. to Christie Lee Cavazos. She also freely disclosed that in 1979, she had undergone corrective genital reassignment surgery.

In 1980, following the final stage of her corrective surgery, she applied for and Texas government officials issued a State of Texas, Department of Public Safety Identification Card, which indicated "SEX: F[emale]." The identification card application was supported by appropriate documentation, including the Texas District Court's Order changing the Petitioner's name and a sworn medical affidavit from her physician-surgeon (who had been salaried in part by the State of Texas).

The State of Texas, Department of Public Safety Identification Card was secured without any fraud: all parties

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[1] Since the early filings with Mrs. Littleton's previous counsel, her husband's first name has been repeatedly misspelled and all prior documents and court opinions have continued that misspelling. As her new counsel, we wish to respect the memory of Mr. Littleton, and have used the correct spelling of his first name throughout this Petition.

(the Court, the Department's clerks and supervisors, and the physician-surgeon) were aware of everything about Mrs. Littleton's past, her transition, and her medical corrective genital reassignment surgery.

In 1988, Mrs. Littleton temporarily moved to Kentucky at which time she met Jonathan Mark Littleton. Using as identification her State of Texas, Department of Public Safety Identification Card, she and Jonathan Mark Littleton applied for and obtained a Kentucky marriage license, indicating she as "bride" and he as "groom," and were legally married in Kentucky. Shortly, thereafter, the Littletons moved to Texas.

During the course of their six and one-half year marriage, the Littleton's, as many married couples, engaged in private, intimate, heterosexual vaginal-penile[2] sexual intercourse. They also filed federal income taxes as husband and wife, walked hand in hand along San Antonio's Riverwalk, enjoyed each other's companionship and company, and, were known in the community as husband and wife. They lived and loved, happily together, as husband and wife, until Jonathan Mark Littleton's untimely death in 1996.

Following discovery of Mrs. Littleton's medical past, Dr. Prange's counsel moved the trial court for and was granted a Partial Summary Judgment And Order Of Severance and a Modified Final Partial Summary Judgment And Order against Mrs. Littleton, alone.

The trial court did not take testimony. However, the parties had stipulated and submitted to two medical

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[2] We apologize for what may seem overly graphic language, however, to accurately discuss the legal implications in this case on transsexuals and the intersexed, we cannot avoid using the correct medical terminology.

affidavits, both stating that Mrs. Littleton "is medically a female." *Littleton* at 232 (App. C 22).

The court ignored the medical evidence and Mrs. Littleton's amended birth certificate and dismissed Mrs. Littleton's cause of action based solely on the fact that her original birth certificate stated she was a male.

ARGUMENT AND REASONS FOR GRANTING THE PETITION

This Court should grant this petition for several reasons.

TEXAS VIOLATED THE FULL FAITH AND CREDIT CLAUSE OF ART. IV, § 1, IN VOIDING A TRANSSEXUAL'S CONSTITUTIONALLY PROTECTED, PRIVATE AND INTIMATE MARITAL RELATIONSHIP, AS A MEMBER OF HER MEDICALLY ASSIGNED GENITAL SEX TO A PERSON OF THE OPPOSITE GENITAL SEX, WITHOUT A COMPELLING AND SUFFICIENT STATE INTEREST OR PROPER GOVERNMENTAL OBJECTIVE.

Under the Constitution, Article IV, § 1, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." The Texas court's decision to refuse to recognize acts and public records of the Commonwealth of Kentucky, in the form of the validity of a marriage, violates the Full Faith and Credit clause. The Full Faith and Credit clause "implies that the public acts of every State shall be given the same effect by the courts of another State that they have by law and usage at home." *Chicago & Alton R.R. v. Wiggins Ferry Co.*, 119 U.S. 615, 622 (1887).

By invalidating the Littleton's marriage, Texas failed to give Full Faith and Credit to the Acts, Records, and Proceedings of a sister state, the Commonwealth of Kentucky, and its own Acts, Records, and judicial Proceedings which were properly recognized in Kentucky. In this case, Texas not only participated in the direct funding and services, including psychological and medical, needed for Mrs. Littleton, to correct and alter her genital sex from male to female (Acts), but, additionally, approved and issued a State of Texas, Department of Public Safety Identification Card (Records), based upon two documents. The first document is a court order changing her name (judicial Proceeding). The second document is a sworn affidavit from her physician-surgeon indicating completion of corrective genital reassignment surgery. The analysis contained in the majority opinion of the Texas Court of Appeals invalidating the Kentucky marriage, failed to look at either the underlying Texas acts, records, and judicial proceedings, given Full Faith and Credit by the Commonwealth of Kentucky, or the human being before it.

The Littleton's *heterosexual* marriage was converted into a "same-sex" marriage only for the purpose of denying a transsexual female the right to seek redress for the death of her spouse at the hands of his physician.[3] The record does not contain any evidence that, at the time of the marriage, the Petitioner was anything but female. In fact, by stipulation, the record contains two affidavits stating that Christie Lee Littleton was medically a female.[4]

In contrast to the *Littleton* case, where corrective genital reassignment surgery completed the transition, the

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[3] In fact, Dr. Prange settled with the remaining parties to the suit, brought by Mrs. Littleton, for an undisclosed sum following the court issuing summary judgment against Mrs. Littleton.

[4] Presumably from the date she completed the corrective genital reassignment surgery.

case of *B. v. B.*, 78 Misc.2d 112, 335 N.Y.S.2d 712 (1974), presented the opposite case of a female to male transsexual who had undergone a hysterectomy and mastectomy but had not had a phalloplasty, the deciding fact upon which the New York court used to determine that where a male lacks the ability to perform sexually as a male, no valid marriage could exist. The constitutional difficultly presented in *B. v. B.* is that of equal protection (discussed below). For example, a male who is injured, suffers from erectile dysfunction, or has had surgery (orchiectomy) related to testicular cancer, is medically no different than a female-to-male transsexual, who, for economic reasons, is unable to afford expensive phalloplasty. Both appear to the public as males, with beards, muscles, and a deepened voice.

To define maleness as the ability to penetrate and femaleness as the ability to procreate is antiquated, not to mention incomplete and inherently unjust.

THE EQUAL PROTECTION CLAUSE OF AMENDMENT XIV, APPLIES EQUALLY TO ALL WOMEN, INCLUDING THOSE WHO MEDICAL PROFESSIONALS IDENTIFY AS WOMEN, AT BIRTH OR LATER, AND TO THEIR HETEROSEXUAL MARRIAGES, REGARDLESS OF WHETHER THE PARTIES' GENITALS WERE PRESENT AT BIRTH OR MEDICALLY FORMED.

The trial and appellate courts chose to ignore the only evidence in the record, and chose to base their decisions on religious beliefs. Justice Hardberger states in the second opening paragraph of the Opinion in *Littleton*, at 223 (App. C 2),

> ***"The deeper philosophical (and now legal) question is: can a physician change the gender of a person with a scalpel, drugs and counseling, or is a***

person's gender immutably fixed by our Creator at birth?" [Emphasis added.]

The above reference to a higher authority is the same rationale that had been used by racists and other bigots to justify segregation based on color, to justify hate crimes, and to justify discriminatory practices, and each was ultimately rejected by this Court as being Constitutionally prohibited, for example:

> *"Almighty God created the races white, black, yellow, malay, and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix."*

This pronouncement by the trial judge in *Loving v. Virginia*, 388 U.S. 1, 3 (1967), ultimately led to this Court's decision prohibiting anti-miscegenation statutes.

Next, the Court of Appeals of Texas, Fourth District, after ignoring the stipulated medical evidence, imposed its own "test" based on postulated genetic chromosome information.[5] Yet, neither Mrs. Littleton nor her deceased husband ever had a chromosome test. Thus, by granting and upholding Summary Judgment based on the aforementioned non-testing, and by assuming that the deceased Mr. Littleton was XY and Mrs. Littleton is *also* XY, the lower courts are requiring Mrs. Littleton to test herself and reveal that information in violation of Texas statutory public policy.

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[5] Based on unknown facts, as stated in *Jay v. Boyd*, 351 U.S. 345, 367 (1956), "No amount of legal reasoning by the Court and no rationalization that can be devised can disguise the fact that the use of anonymous information to banish people is not consistent with the principles of a free country."

Tex. Rev. Stat. Ann. Art. 9031 (Vernon 1999), which prohibits (with exceptions for which this case does not factually qualify) the use of genetic information by a "(8) State agency," defined to include the "judicial branch of state government."

Contrary to both Justice Hardberger's statement, *Littleton*, at 230 (App. C 14), and Justice Angelini's concurring opinion, *Id.*, at 231 (App. C 18), that the Texas Legislature has not spoken, the Texas Legislature has spoken on the confidentiality of genetic testing. First in Tex. Rev. Stat. Ann. Art. 9031 (Vernon 1999), and then in Tex. Lab. Code Ann. § 21.402 – 21.403 (Vernon 1999) (prohibiting discrimination in employment based on genetic information). It may be of interest to this Court that the American Medical Association has spoken on the confidentiality of genetic testing. (See, AMA Code of Medical Ethics, Code of Medical Ethics, §§ 2.132, 2.135, 2.137, 5.08, and, 5.09 (1996-97). Texas does not have a statute requiring chromosomal testing as a prerequisite to marriage, nor does any other state.

Curiously, though not in the instant record, when it suited the purpose of the State of Texas, the Attorney General of Texas forced Mrs. Littleton, as the wife of Mr. Littleton in a community property state, to pay child support for Mr. Littleton's children from a prior marriage, even when he was ill and unemployed, as indicated on the Form 1040, jointly filed by the Littletons with the Internal Revenue Service.[6]

Our whole system of law is predicated on the general, fundamental principle of equality of application of the law. *Hirabayashi v United States*, 320 U.S. 81, 100 (1943). Yet, as pointed out by the dissent in *Littleton*,

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[6] The IRS accepted eight joint Form 1040 filings for the six and one half year marriage.

> "While a birth certificate would ordinarily establish a person's gender conclusively, Christie presented significant controverting evidence that indicated she was female. This evidence was so substantial that it raised a genuine issue of material fact about whether she was Jonathon's surviving spouse. In an ordinary summary judgment case, such controverting evidence would prevent this court from concluding that the movant had met its burden on a motion for summary judgment. But in this rather extraordinary case, *the majority has determined that there are no significant facts that need to be determined* and concluded that Christie is a male as a matter of law. *Despite this conclusion, there is no law to serve as the basis of this conclusion.*" [Emphasis added.]

Littleton, at 232. (App. C 22.)

A. Conflicting State And Federal Decisions

Texas' treatment of transsexuals as being capable of marriage for child support purposes, but declaring those same marriages void for estate purposes or wrongful death causes is contradictory and patently discriminatory. In this fact pattern the state has asserted one individual is female and the wife for collection of child support, and allowed a private litigant to claim that the same individual is male to prevent the wife from asserting her rights as the survivor of her husband.

Taking this situation to its logical conclusion, Mrs. Littleton, while in San Antonio, Texas is a male and has a void marriage; as she travels to Houston, Texas, and enters federal property, she is female and a widow; upon traveling to Kentucky she is female and a widow; but, upon entering

Ohio, she is once again male and prohibited from marriage; entering Connecticut, she is again female and may marry; if her travel takes her north to Vermont, she is male and may marry a female; if instead she travels south to New Jersey, she may marry a male. The ability of Mrs. Littleton and many other transsexuals to freely travel, including travel without risk due to their sex status (e.g., which bathroom she may legally use), and to move and reside in many parts of this country is in question.

This case presents this Court with the opportunity to again correct and unify the path being traveled by the States with regard to the rights of citizens who are transsexuals, just as this Court has done for those individuals who have been subject to discrimination based on the classifications of race, sex, national origin, ethnicity, and religion.

There is no provision in any law, act, statute or ordinance in this land that abolishes or removes the rights of individuals to constitutionally protected freedoms if they choose to alter their being, in this case, by lawful, partially state-publicly funded, corrective genital reassignment surgery aimed at presenting a congruent self. This includes statutes that address the issue of gender transition more specifically than those of Texas, including that of Kentucky, the state in which the Littletons' marriage took place. *See* Ky. Rev. Stat. Ann. § 213.121 (5) (1999). Also significantly, neither the federal Defense of Marriage Act, 28 U.S.C.A. §1738C (1996), nor any of its State counterparts, addresses the situation of a marriage involving a transsexual.

The only prior decision by this Court involving a transsexual was the case of *Farmer v. Brennan*, 511 U.S. 825 (1994), a unanimous decision (with concurring opinions). In *Farmer*, a pre-operative transsexual, who had undergone estrogen therapy, breast implants, and an "unsuccessful" orchiectomy, had been subject to discriminatory practices

within the federal prison system. This Court remanded the matter to the lower courts instructing them to appropriately consider the transsexual's complaint.

Several jurisdictions in this country have addressed the problem posed by the facts of the *Littleton* case. For example, in *Darnell v. Lloyd*, 395 F. Supp. 1210, 1214 (D. Conn. 1975), a U.S. District Court held that there was "no state interest . . . whatsoever" in the arbitrary refusal to grant state recognition of a transsexual's "current sexual status."

In Ohio, a trial court published an opinion in the case *In re Ladrach*, 32 Ohio Misc.2d 6, 513 N.E.2d 828, 832 (Ohio Probate Court, 1987), a declaratory judgment action in which the court decided that a post-operative transsexual female (born in Ohio) was not allowed to marry a male (because Ohio does not have a law allowing amendment to birth records).

In New Jersey, the state Supreme Court, in the case *M.T. v. J.T.*, 140 N.J.Super. 77, 355 A.2d 204 (1976), upheld a marriage, between a transsexual female and a male, in awarding support and maintenance upon divorce.

Interpretation of the exact same fact pattern and Texas statutes at issue in the instant state case resulted in an opposite federal ruling in *Benefit Determinations Involving Validity of Marriage of Transsexual Veterans*, VAOPGCPREC 15-90, 05-25-90 8-23 Marriage 7-2 Med. Treat-Repro. Function Vet. Aff. Op. Gen. Couns. Prec. 15-90, 1990 WL 605201 (D.V.A.),[7] holding:

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[7] In this case arising in Houston, Texas, the relevant facts before the Veteran's Administration included: transition in 1977, surgery in 1985, name change order in 1986, marriage in 1987, V.A. claim filed in 1988, Order to amend birth cert. 3/9/89, Tx Dept. of Health, Bureau of Vital Statistics amended birth record 5/10/89, appellate decision in 1990.

"Under Texas law, where a veteran has anatomically changed his/her sex by undergoing sexual-reassignment surgery and has thereafter legally married a member of his/her former sex, his/her marriage partner may be considered the veteran's spouse for the purpose of determining entitlement to additional vocational rehabilitation allowance payable on account of a dependent spouse."

B. Recent International Decisions

Justice Thomas recognized in his concurring opinion in *Farmer*, that, "evolving standards of decency * * * mark the progress of a maturing society." *Ibid.*, at 859 (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)). Evolution has not escaped the English case of *Corbett v. Corbett*, 2 All E.R.1 33 (P. 1970), (a reported trial level opinion which decided that for the purpose of marriage, chromosomes are dispositive and thus determine one's sex).

Many jurisdictions, around the world, that had previously followed the analysis in *Corbett*, Id., have evolved to expressly, and some forcefully, repudiate Judge Ormrod's inflexible edict. For example, as stated in an Australian repudiation,

"Whatever may once have been the case, the English language does not now condemn post-operative male-to-female transsexuals to being described as being of the sex they profoundly believe they do not belong to and

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For comparison Mrs. Littleton's facts: transition about 1965, name change order in 1977, surgery in 1979, marriage in 1989, wrongful death law suit filed in 1997, Order to amend birth certificate in 8/7/98, Tx Dept. of Health, Bureau of Vital Statistics amended birth record 8/14/98, appellate decision in 1999.

the external genitalia of which, as a result of irreversible surgery, they no longer have.

* * *

"Negative attitudes towards transsexuals are based fundamentally on religious and moral views and assumptions which are slowly changing in modern society . . .."

Secretary, Dept. of Social Security v. S.R.A. (1993) 118 A.L.R. 467, 472, 493 (Fed. Ct. Gen. Div. Australia).

In New Zealand, in *Attorney-General v. Otahuhu Family Court*, (1994) 1 NZLR 603, 607, "If society allows such persons to undergo therapy and surgery in order to fulfil that [the desire to alter their genital sex] desire, then it ought also to allow such persons to function as fully as possible in their reassigned sex, and this must include the capacity to marry."

The Court of Justice of the European Communities, continuing the momentum against the *Corbett* philosophy, in an appeal of Case C-13/94, *P. v S. and Cornwall County Council*, a case originating in England, issued a Judgment Of The Court on April 30, 1996, stating in part, at paragraph 7, "Under English law [referring to *Corbett*], P. [who is a male-to-female transsexual] is still deemed to be male." Then, in overriding England's assertion, this highest European Court stated,

"21. Such discrimination is based, essentially if not exclusively, on the sex of the person concerned. Where a person is dismissed on the ground that he or she intends to undergo, or has undergone, gender reassignment, he or she is treated unfavourably by comparison with persons of the sex

to which he or she was deemed to belong before undergoing gender reassignment.

"22. To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard."

C. Equal protection includes all women.

The marital relationship, held as a right so basic and fundamental and so deeply-rooted in our society, while not mentioned specifically in the Constitution, has been determined, in a concurring opinion of this Court, to be one of those unenumerated rights within the Amendment IX. *Griswold v. Connecticut*, 381 U.S. 479, 488, 491, 492, 499, 502 (1965). Additionally, this fundamental right is protected under the Amendment XIV, due process clause. *Loving, supra*, at 12; *Griswold, supra*, at 486; *Zablocki v. Redhail*, 434 U.S. 374, 383-87 (1978).

Under cases beginning with *Griswold v. Connecticut*, 81 U.S. 479 (1965), and heightened by *Roe v. Wade*, 410 U.S. 113 (1973), a fundamental right, such as marriage, carries with it the burden on government that any restraint be justified under a "compelling state interest" analysis. Further, following *United States v. Virginia*, 518 U.S. 515, 533 (1996), this Court directed the focus of a reviewing court to determine whether the state's justification is "exceedingly persuasive."

Marriage is an economic partnership, *Kahn v. Kahn*, 801 F. Supp. 1237 (S.D.N.Y., 1992), or a civil contract between parties, *Fornshill v. Murray*, 1 Bland 479 (1828), and procreation is not a requirement.

Therefore, in regard to the ability to marry, there must be a compelling state interest to justify discriminating between a female who has had a complete hysterectomy (removal of uterus and ovaries) and is hormonally supported by hormone replacement therapy (HRT), and, a female who's vagina was surgically created and who is hormonally supported by HRT, or, for that matter, a female who has been in a serious automobile accident, and who has had pelvic reconstruction, including a neo-vagina.

The *Littleton* court failed to apply either a compelling state interest" or an "exceedingly persuasive justification" analysis for declaring Mrs. Littleton a male and voiding her Constitutionally protected Kentucky marriage under Texas law.

D. Birth Record Amendments, Corrections, & Prohibitions.

The Texas legislature has not passed any statute on the issue of a transsexual amending a birth record. However, "a number of other states have determined that transsexuals who have undergone corrective genital reassignment surgery are entitled to amend their official documents to indicate their self-identified sex."[8] *See, e.g.*, Ala. Code §22-9A-19 (1997); Ariz. Rev. Stat. Ann. § 36-326(a) (4) (West 1993); Cal. Health & Safety Code §§103,430, 103,425 (West 1997); Colo. Rev. Stat. Ann. § 25-2-115(4) (1990); D.C. Code Ann. § 6-217 (d) (1995); Ga. Code Ann. § 31-10-23(e) (Harrison 1998); 10 Guam Gov't. Code § 3222 (1998); Haw. Rev. Stat. § 338-7.7 (1993); 410 Ill Comp. Stat. Ann. § 535-17 (West 1997); Iowa Code Ann. § 144.23.3 (1997); La. Rev. Stat. Ann §40:62 (West 1992); Md. Health-Gen. I Code Ann., § 4-214 (Lexis 1995); Mass. Gen. Laws Ann. Ch. 46 § 13 (West 1993); Mich. Comp. Laws § 333.2891 (1998); Miss. Code

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[8] Greenberg, Julie A., *When Is A Man A Man, And When Is A Woman A Woman?*, __ FLA. L. REV. __ (Sept. 2000).

Ann. 41-57-21 (1998); Mo. Ann. Stat § 193.215(9) (West Supp. 1999); N.M. Stat. Ann. § 24-14-25 (D) (Michie 1997); N.C. Gen. Stat. § 130A-118(b)(4) (1997); Or Rev. Stat § 432.235 (4) (1997); Utah Code Ann. § 26-2-11 (Supp. 1998); Wis. Stat. Ann. § 69.15 (West 1990).

Tennessee specifically prohibits changes to birth records based upon corrective genital reassignment surgery. Tenn. Code Ann. § 68-3-203(d) (1996).

Whether or not Mrs. Littleton's birth certificate indicated "male" or "female" at the time of her marriage is not relevant, or, stated in its best light, placing form over substance. The fact remains that at the time she married Jonathan Mark Littleton, Mrs. Littleton was female, both physically and mentally, and legally. Since neither Texas nor Kentucky require presentation of a birth certificate as a prerequisite for obtaining a marriage license, and require only a state issued identification,[9] the marriage was legal and entitled to be given Full Faith and Credit by the Texas courts, and Mrs. Littleton was entitled to the protections afforded by the equal protection clause of Amendment XIV.

E. Impact of this Case, Nationally.

As mentioned in the statement of the case, an equally important question is whether the constitutionally protected right to marry extends to transsexuals, and if so, whether, as,

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[9] Tex. Fam. Code Ann. § 2.005 (b) (West 1999), states: "**The proof must be established by a** certified copy of the applicant's birth certificate or by some certificate, license, or **document issued by this state**, the United States, or a foreign government." [Emphasis added.] Ky. Rev. Stat. Ann. § 400.100 (5)(b) (West 1999), states: "Vital information for each party, including full name, date of birth, place of birth, race, condition (single, widowed, or divorced), number of previous marriages, occupation, current residence, relationship to other party, full names of parents. " [No statutorily required identification.]

either the *male to female* bride versus groom, or, the *female to male* groom versus bride.

Christie Lee Littleton was a bride for six and one-half years, and was a widow for another three years until the Texas Court of Appeals converted her heterosexual marriage into a "same-sex" marriage, then voided it, and, made her only eligible for marriage as a *male to female* groom.

Contrast this case to the Veteran's Affairs Opinion, *supra*, the *female to male* groom in that federal ruling was sensibly allowed to remain a groom, and, the Texas marriage to his female bride was allowed to stand.

The resolution of this issue has a direct effect on the tens-of-thousands of persons who are transsexuals, the millions of people who are intersexed,[10] and the millions of people who transsexuals and the intersexed have married or seek to marry. While the exact incidence of transsexuality and intersexuality are unknown, some estimates indicate that between 3,000 and 10,000 transsexuals have undergone hormonal and corrective genital reassignment surgery and live in the United States. Another 30,000 to 60,000 people consider themselves candidates. *See* David W. Meyers, *The Human Body and the Law*, 221 (2d ed. 1990). Although the exact incidence of intersexuality is uncertain, the intersexed constitute between one-tenth of one percent and

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[10] The intersexed are those humans who have chromosome patterns other than XX or XY. For example, XYY, XYYY, XO, XXY, XXXY and any other of the numerous combinations currently identified. Most intersexed individuals initially do not know that they are intersexed, especially those who are older adults, for whom testing was not available, or, those who are younger adults, who have had no outward physical manifestations, medical, or reproductive fertility problems, and, those who are children, who are under the care and control of their parents. *See*, Greenberg, J., *Defining Male and Female: Intersexuality and Collision Between Law and Biology*, 41 ARIZ. L. REV. 265 (1999).

four percent of the population. *See*: Anne Fausto-Sterling, *The Five Sexes: Why Male and Female are not Enough*, SCIENCES, Mar.-Apr. 1993, at 20-21; Alice D. Dreger, HERMAPHRODITES AND THE MEDICAL INVENTION OF SEX at 43 (1998).

A number of cases addressing the rights of transsexuals are in various stages of litigation. For instance, in Kansas, a male-to-female post-operative transsexual's right to inherit from her husband's estate is on appeal. In California a post-operative male-to-female transsexual married a female in England. Her employer, the Los Angeles fire department, contested the validity of her marriage (the case recently settled). In New Hampshire, the U.S. Postal service is refusing to acknowledge a male-to-female transsexual's right to be treated as a female. Finally, in Vermont, a male-to-female transsexual forced the state to issue a license to marry a woman because the state had refused to amend her birth certificate to read "female" (resulting in a legal, but socially appearing same sex marriage).

Contrary to Justice Hardberger's statement in *Littleton*, that, "Christie is medically termed a transsexual, ***a term not often heard on the streets of Texas***, nor in its courtrooms," [Emphasis added.] *Id.*, at 225 (App. C 5), in the past four decades since Renee Richards sued to establish her rights to play tennis professionally (*Richards v. U. S. Tennis Ass'n*, 93 Misc.2d 713, 400 N.Y.S.2d 267 (1977)) the media have repeatedly put transgendered topics before the public.[11]

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[11] Public issues involving transsexuals and the intersexed is evident from the following sampling: *The Washington Post* (Jun 2000); *The Washington City Paper* (Sep 1999); *Esquire Magazine* (Apr 1995); news shows such as Good Morning America, A&E Investigative Reports; television talk shows like Donahue and Oprah; sitcoms like Night Court,

The *Richards* court, in analyzing the criteria to determine ones sex, stated, "However, it [referring to chromosomes] is not and should not be the sole criterion, where as here, the circumstances [clear anatomical and psychological evidence of femaleness] warrant consideration of other factors." *Ibid.*, at 721.

F. Defense of Marriage Act (DOMA) Issue

Applying DOMA, 28 U.S.C.A. §1738C (1996), to the *Littleton* case is tantamount to applying an *ex post facto* law in a criminal case. In *Littleton*, both the marriage and Jonathan Mark Littleton's death occurred before DOMA was enacted. In the *Littleton* decision, *supra*, at 226 (App. C 5), Justice Hardberger justified voiding a marriage under the public policy law enacted to protect states from having to give Full Faith and Credit to "same-sex" marriages entered into in sister states. By applying DOMA to a heterosexual marriage he first had to find Mrs. Littleton to be male to convert it into a prohibited marriage.

However, the courts and legislatures making the determination that "same-sex" marriages are illegal were considering gay and lesbian marriages. They were not considering marriages involving post-operative transsexuals. Adding transsexuals into the marital equation makes identifying "same-sex" marriages more theoretically problematic, but not insurmountable. The present public policy of promoting only heterosexual marriages becomes

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The Drew Carey Show, Becker, and Will & Grace, and drama, including Picket Fences, Chicago Hope, and Judging Amy; in addition motion pictures dealing with transgender issues include "Some Like It Hot," "Victor/Victoria," "La Cage aux Fax" and "Birdcage," "Rocky Horror Picture Show," "Tootsie," "To Wong Foo, Thanks for Everything, Julie Newmar" and recently, "Boys Don't Cry" and "The Brandon Teena Story."

upset when the society views a transsexual's heterosexual appearing marriage under a microscope (looking at issues other than the presentation of the couple).

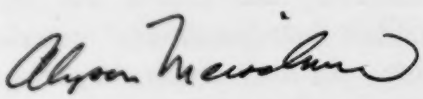
> ***"Every schoolchild, even of tender years, is confident he or she can tell the difference, especially if the person is wearing no clothes."*** *Littleton*, at 223 (App. C 1).

CONCLUSION

Maintaining an orderly society is a lawful objective of government. Important issues of Full Faith and Credit of lawful marriages, equal protection for transsexuals, and the conflicting decisions among several states and federal authorities as to the status of transsexuals regarding marriage have reached this Court for decision and guidance.

This Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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